

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

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| In the Matters of |) | |
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| JAMES A. KAY, JR. |) | WT Docket No. 94-147 |
| |) | |
| Licensee of One Hundred Fifty Two Part 90 |) | |
| Licenses in the Los Angeles, California Area |) | |
| |) | |
| MARC SOBEL AND MARC SOBEL |) | WT Docket No. 97-56 |
| D/B/A AIR WAVE COMMUNICATIONS |) | |
| |) | |
| Licensee of Certain Part 90 Licenses |) | |
| in the Los Angeles, California Area |) | |

MOTION FOR STAY PENDING ACTION ON MOTION TO MODIFY

James A. Kay, Jr. ("Kay") and Marc D. Sobel ("Sobel") (jointly, "Petitioners"), by their attorneys, hereby respectfully move the Commission to stay the effectiveness of the license revocations ordered in the above-captioned proceeding pending action by the Commission on Petitioners' August 3, 2005, *Motion to Modify Sanctions*, in support whereof the following is respectfully shown:

1. In the above-captioned proceedings, the Commission has ordered the revocation of certain 800 MHz SMR licenses held by Petitioners.¹ This was a "partial" revocation sanction, *i.e.*, the Commission did not find Petitioners disqualified, and only their then-existing 800 MHz authorizations are subject to revocation. Kay and Sobel are authorized to continue operations

¹ *James A. Kay, Jr.*, WT Docket No. 94-147: *Decision*, 17 FCC Rcd 1834 (2002), on recon., *Memorandum Opinion and Order*, 17 FCC Rcd 8554 (2002); *Marc Sobel and Marc Sobel d/b/a Air Wave Communications*, WT Docket No. 97-56: *Decision*, 17 FCC Rcd 1834 (2002), on recon., *Memorandum Opinion and Order*, 17 FCC Rcd 8562 (2002), on further recon., *Memorandum Opinion and Order*, 19 FCC Rcd 801 (1994). In a joint appeal, both decisions were affirmed.

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pursuant to the subject 800 MHz licenses until all appeals are final.² A petition for writ of certiorari in the matter is scheduled to be considered at the United States Supreme Court's September 26, 2005, conference. Petitioners believe a decision could be announced as early as Monday, October 3, 2005.

2. In the *Motion to Modify Sanction*, filed on August 3, 2005, Kay and Sobel have proposed an alternative sanction package in lieu of the revocation of their 800 MHz licenses. The proposed modified sanction package would consist of: (a) the contribution by Petitioners (free of any compensation) of a block of clear UHF (470-512 MHz) channels for use by public safety entities in the Los Angeles area; and (b) a monetary forfeiture in the aggregate amount of \$150,000, plus an additional voluntary contribution of \$600,000 to the U.S. treasury. The amount of UHF spectrum to be contributed and the size of the monetary contribution are matters to be negotiated. The motion contemplates that Petitioners would negotiate with designated Commission personnel to arrive a mutually agreeable alternative sanction package to be presented to the Commission for review.

3. The Enforcement Bureau requests a 40 day extension of time until September 26, 2005, to respond to the *Motion to Modify Sanctions*. Significantly, this is the same day as the Supreme Court conference at which the pending request for certiorari is to be considered. In separate comments on the extension request being filed concurrently herewith, Petitioners state that they have no objection to the extension of time, provided that the effectiveness of the revocation orders is stayed pending consideration of the motion. Accordingly, Petitioners here specifically request such a stay.

² WT Docket No. 94-147, *Decision*, 17 FCC Rcd at 1866, ¶109; WT Docket No. 97-56, *Decision*, 17 FCC Rcd at 1895, ¶90. The Court of Appeals affirmed the Commission decisions in a joint appeal. *Kay v. FCC*, 396 F.3d 1188 (D.C. Cir. 2005). A timely filed a petition for writ of certiorari is pending before the United States Supreme Court (Case No. 05-46, filed July 5, 2005). The Court of Appeals has stayed the issuance of its mandate pending Supreme Court review.

4. A stay is justified if the movant shows that: (1) it is likely to prevail on the merits of subsequent review; (2) it will suffer irreparable harm in the absence of a stay; (3) a stay will not injure other parties; and (4) a stay is in the public interest. *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958). When the second, third and fourth factors strongly favor interim relief, a tribunal "may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). The analysis involves a balancing of these issues; thus, a stay may be justified by a showing of high probability of success and some injury, or vice versa. See *Cuomo v. United States Regulatory Commission*, 772 F.2d 972, 974 (D.C. Cir. 1985). Petitioners respectfully submit that application of these standards to the instant motion dictates in favor of a stay.

5. In the *Motion to Modify*, Petitioners ask the Commission to direct negotiations looking toward a modified sanction package that would continue to serve as a deterrent to any future misconduct. At the same time, it would secure for immediate public safety use a block of additional spectrum in what is perhaps the most highly congested and spectrum starved market in the country. By contrast, the current sanction of revoking Petitioners' 800 MHz licenses does not increase public safety spectrum availability. The existing sanction will be fully preserved in the interim and will still be imposed if the Commission is unable to satisfy itself that an alternative is in the public interest. Given the limited nature of the relief requested—*i.e.*, undertaking negotiations to develop an alternative sanction that both serves as a deterrent and significantly benefits public safety communications—the likelihood of success factor weighs in favor of granting a stay.

6. The injury to Petitioners from the revocation orders is obviously irreparable. Given the recent changes in 800 MHz licensing rules and the current reconfiguration of the 800

MHz band, the loss of these licenses by Petitioners would be permanent. But the Commission should also consider the injury to the public interest from losing this opportunity for much-needed public safety spectrum. The short term relief of stay, with preservation of and no prejudice to the current sanction, is certainly warranted to avoid the permanent loss of the opportunity for additional public safety spectrum at no cost to the public agencies.

7. The only party to these proceedings other than Kay and Sobel is the Enforcement Bureau, and possibly the Wireless Telecommunications Bureau.³ The Enforcement Bureau has an understandable interest in preserving the integrity of the Commission's enforcement policies and procedures. The requested stay would merely preserve the Commission's option of considering the *Motion to Modify Sanctions* rather than allowing the matter to become moot by fiat. If the *Motion to Modify Sanctions* is ultimately granted, moreover, the modified sanction will be approved by the Commission only upon a finding that it maintains the integrity of the Commission's enforcement policies and serves the public interest. For its part, the Wireless Telecommunications Bureau's primary interest is the potential public interest benefit that could result from added public safety spectrum. In its extension of time request, the Enforcement Bureau asserts that additional time is required to consult with the Wireless Telecommunications Bureau as to the important public policy issues raised by the *Motion to Modify Sanctions*. Clearly, then, the interests of the Parties adverse to Petitioner are served, not harmed, by granting a temporary stay to allow adequate time for full and careful consideration of these important public policy questions.


8. The potential for a significant public interest benefit from the proposed modified sanction is self-evident, undeniable, and overwhelming. Los Angeles is one of the most

³ There is some question as to whether or not the Wireless Telecommunications Bureau is a party to these proceedings for purposes of the *ex parte* rules. This matter is addressed in Petitioners' concurrently-filed comments on the Enforcement Bureau's extension of time request.

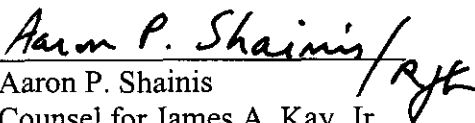
congested mobile radio spectrum markets in the country. Public Safety users in Los Angeles are heavy users of UHF spectrum and have repeatedly sought additional UHF spectrum from the Commission. The requested stay does nothing more than temporarily preserve the status quo to allow the Commission to give its full and careful consideration to this proposal for making additional UHF spectrum available to Los Angeles area public safety entities at no cost to them. At a minimum the public interest demands consideration of this proposal, and the stay merely prevents the matter from becoming moot.

WHEREFORE, Petitioners hereby request that, pending consideration of and until final action on the *Motion to Modify*, the Commission stay the effectiveness of the license revocation sanctions ordered in the above-captioned proceedings.

Respectfully submitted:

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Dated: August 23, 2005

Certificate of Service

I, Robert J. Keller, counsel for James A. Kay, Jr., and Marc Sobel d/b/a Air Wave Communications, hereby certify that on this 23rd day of August, 2005, I caused copies of the foregoing *Motion for Stay Pending Action on Motion to Modify Sanctions* to served, by U.S. mail, first class postage prepaid, on the following:

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